IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2009 Session

LILA REINHARD EVERETT v. DAVID EVERETT

Appeal from the Fourth Circuit Court for Knox County
No. 100488 Bill Swann, Judge

No. E2008-00472-COA-R3-CV - FILED MAY 12, 2009

Lila Reinhard Everett ("Mother") sued David Everett ("Father") for divorce. The case was tried before a Special Master. The Trial Court modified the Special Master's report and entered an Order on February 19, 2008, *inter alia*, pronouncing the parties divorced and entering a Permanent Parenting Plan naming Father as the primary residential custodian of the parties' four minor children with Mother to have visitation.[1] Mother appeals raising issues regarding custody. We vacate only that portion of the Trial Court's order dealing with custody, and we remand for a determination of those issues related to custody.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated, in part; Affirmed, in part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, J.J., joined.

Brent R. Watson and Suzanne N. Price, Knoxville, Tennessee for the Appellant, Lila Reinhard Everett.

Scarlett B. Latham, Albany, Kentucky, and David L. Valone, Knoxville, Tennessee for the Appellee, David Everett.

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[1] The Trial Court entered a Final Order on June 3, 2008, distributing the marital property and debts and disposing of all remaining matters in the case. No issues were raised in this appeal regarding any matters other than custody.

OPINION

Background

After twelve years of marriage, Mother filed for a divorce from Father. The parties have four minor children ("the Children"). The parties mediated and were able initially to reach agreement with regard to parenting and custody issues. The Trial Court entered an order on October 21, 2005 accepting the Permanent Parenting Plan agreed to by the parties. The parties then began to operate under this Permanent Parenting Plan. The Permanent Parenting Plan named Mother as the primary residential custodian of the Children with Mother to have approximately 60% of the time with the Children and Father to have visitation giving him approximately 40% of the time with the Children. The parties were unable to reach agreement during mediation on other issues, and the case proceeded to trial. The Trial Court appointed a Special Master to hear the case.

In February of 2007, before the hearing was held by the Special Master, Mother filed a Notice of Relocation and Petition to Modify seeking permission to relocate to another state with the Children for employment reasons. In July of 2007, Father filed a Petition to Change Custody seeking to be named the primary residential custodian of the Children.

James F. Murray, Ph.D. was appointed by the Trial Court to do a custody evaluation in this case. Dr. Murray prepared a written report of his opinions and also testified extensively at the hearing before the Special Master. This hearing lasted approximately eight days. During the hearing, Dr. Murray testified on three separate occasions. Dr. Murray recommended that Father be named the primary residential parent should Mother choose to relocate, and, if Mother instead chose to remain in Knoxville, the custody arrangement remain as it was.

After the hearing, the Special Master prepared and submitted to the Trial Court a written report detailing his findings and recommendations. With regard to custody, the Special Master recommended that Mother be allowed to relocate with the Children. Mother filed exceptions to the Special Master's report with regard to the distribution of marital property. Father filed exceptions to the Special Master's report with regard both to custody and the division of the martial property.

The Trial Court held a hearing on the exceptions to the Special Master's report. During that hearing, the Trial Court announced that it had not read the transcript of evidence from the Special Master's hearing. The Trial Court stated:

> The Court will take such argument touching upon the report as you wish to make. The Court will not read the transcript of the hearing in all its 2,200 pages or whatever it's length may be, because to do so would be too inefficient. We have great confidence in the master.
>
> Now, to the extent that it is necessary to advert to the transcript as we work our way through the exceptions to the master report, we shall, of course, do so. It is

this Court's strong preference, which is not always abided by, that we limit our review of the master's report to argument and receive no additional proof.

It may be that we might receive some additional proof, but we'll pass on that only after we have concluded our argument.

* * *

The other matter that we need to make clear upon the record is that there is no obligation on the Court of record to read through a transcript from the master's report.

Indeed, orders of reference to masters may omit the obligation to file a transcript of the proceedings. In this case, we required the transcript of the proceedings; that that be furnished. But the Court does not have to read its way through it. Indeed, to do so would fly in the face of many of the justifications and rational for the use of a special master.

With regard to Dr. Murray's report, the Trial Court stated:

I have read the Murray report thoroughly. I'd indicate to you that the master, of course, used the Murray report.[2] We've already adverted to how he used it. This judge gives it great weight. Dr. Murray is a consummate professional and he is the Court's own witness here, and his work product will be given most serious consideration as you go into your arguments as to what the master has done.

* * *

I told you that I have completely read the Murray report; that he is known to be a consummate professional, and I intend to give it great weight.

After the hearing, the Trial Court entered an order on February 19, 2008, *inter alia*, declaring the parties divorced and modifying the Special Master's report as it related to custody. With regard to the custody of the Children, the Trial Court held that Father would be the primary residential parent with Mother to have visitation. On June 3, 2008, the Trial Court entered a Final Order, *inter alia*, distributing the marital property and disposing of all remaining matters between the parties. Mother appeals to this Court.

Discussion

[2] During the hearing before the Special Master, Father attempted to introduce Dr. Murray's report as an exhibit. Mother raised an objection and the Special Master marked the report for identification only stating "since there's not a jury here I can make the determination and filter out what shouldn't be read and what should be read."

Although not stated exactly as such, Mother raises three issues on appeal: 1) whether the Trial Court erred in relying on Dr. Murray's report as substantive evidence without reviewing Dr. Murray's testimony; 2) whether the Trial Court erred in modifying the Special Master's report; 3) whether the Trial Court erred in denying Mother's request to relocate with the Children.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first consider whether the Trial Court erred in relying on Dr. Murray's report as substantive evidence without reviewing Dr. Murray's extensive testimony. In *Dover v. Dover*, this Court discussed a situation in which a trial court appointed its own expert and then admitted the expert's written report over objections. *Dover v. Dover*, 821 S.W.2d 593 (Tenn. Ct. App. 1991). In *Dover*, we stated:

> Rule 706, Rules of Evidence, authorizes the court to appoint expert witnesses. The rule in part provides:
>
> > [T]he court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, the witness's deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> The rule contemplates that if the findings of the expert witness are to be considered as evidence, the expert will be called to testify. This requirement is not a departure from the general rule that the court may not rely on an unsworn report from an expert to decide issues before the court. *See Reed v. Tennessee Farmers Mutual Insurance Co.*, 483 S.W.2d 721 (1972); *Hultberg v. Hultberg*, 259 N.W.2d 41 (N.D. 1977); *Brown v. St. Clare's Hospital*, 13 A.D.2d 734, 214 N.Y.S.2d 614 (1961).
>
> The calling of an expert witness by the court can have a significant impact on the adversarial role of the parties. In most instances it should only be done when the court is dissatisfied with the proof presented by the parties. *See Corcoran v. Foster*

> *Auto GMC, Inc.* 746 S.W.2d 452 (Tenn. 1988). Rule 706 does not authorize the filing of a written unsworn report of a potential expert witness as evidence over the objection of a party.

Id. at 594-95. In *Dover*, the trial court admitted the expert's written report even though the expert did not testify. *Id*. at 595. On appeal this Court struck the *Dover* expert's written report. *Id*. at 595.

In the case now before us, although Dr. Murray testified before the Special Master, the Trial Court did not review Dr. Murray's testimony, or indeed any of the testimony taken before the Special Master. Instead, the Trial Court relied upon Dr. Murray's written report as evidence. Father argues on appeal that there was no error with regard to this issue as Dr. Murray's testimony supported his conclusions as contained in his report. While Father's assertion may be true, the Trial Court had no way of knowing this as it refused to read the transcript of Dr. Murray's testimony. Rule 706 of the Tennessee Rules of Evidence specifically provides that a court appointed expert such as Dr. Murray "shall be subject to cross-examination by each party, including a party calling the witness." Tenn. R. Evid. 706(a). Here, Dr. Murray did testify and was cross-examined before the Special Master. The Trial Court's reliance on Dr. Murray's report, which at a minimum contains hearsay, rather than Dr. Murray's testimony, including cross-examination, defeats the specific provision of Rule 706 providing for cross-examination of a court-appointed expert. This Court has yet to see a lawyer so skillful as to be able, through cross-examination, to elicit responses from a written report.

We hold that the Trial Court erred in relying upon Dr. Murray's written report and not reviewing Dr. Murray's testimony. Given this, we vacate that portion of the Trial Court's judgment dealing with custody. Our resolution regarding Mother's first issue renders consideration of the remaining issues unnecessary at this time. The parties did not appeal any issues other than custody, and we affirm the Trial Court's order as to all other issues. We remand this case to the Trial Court for further proceedings on the exceptions to the Special Master's report regarding custody only. We direct that the Children are to remain where they are until the Trial Court makes its determination upon remand.

We note that a trial court has the right to require parties raising objections to a master's report to be very specific about the exceptions and to direct the trial court to the precise portions of the record the party seeks to have reviewed by the trial court. It would indeed be inefficient to require a trial court to read a transcript of over 2,000 pages in all cases if the majority of the evidence contained in the transcript did not pertain directly to the exceptions being raised to the master's report. On remand, the Trial Court may order the parties to point to specific portions of the transcript that pertain to the exceptions raised with regard to custody.

Conclusion

The judgment of the Trial Court is vacated as to custody, and affirmed as to all other aspects. This cause is remanded for further proceedings consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellee, David Everett.

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D. MICHAEL SWINEY, JUDGE